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In the Supreme Court of the United States

OCTOBER TERM, 1974

AUBREY E. DOUGLAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner seeks compensation from the United States under 28 U.S.C. 1498 for its allegedly unauthorized use of an invention described and claimed in a patent issued to petitioner. The Court of Claims dismissed the suit on the ground that petitioner's claimed patent was invalid under 35 U.S.C. 103 for obviousness (Pet. App. A-36 to A-57).

1. The patent at issue proposed a mechanism for diverting the combustion gases of a jet engine away from the direction of normal flow (directly rearward of the plane) and channelling the flow so that the resultant "vectored thrust" could be employed for braking aircraft speed, for assisting in takeoff or landing, or for control purposes. The allegedly infringing use of petitioner's patent occurred when the United States brought into this country from England in 1965 six vertical-takeoff jet airplanes and

eleven replacement engines (called the Pegasus) and then permitted the British to demonstrate the production version of the plane in this country in May 1969 (Pet. App. A-36 to A-39).

The Court of Claims found that petitioner's patent "only proposed a solution to the problem of how, mechanically, to directionally vary the thrust [of a jet engine], not how to vary the thrust while maintaining controllability of the aircraft" (*id.* at A-44). The court concluded that the specific mechanism proposed by petitioner was an obvious variation of the prior art, and that any nonobviousness "lay not in the mechanism but in the manner in which the mechanism was used in an airplane to vary the thrust direction while maintaining controllability of the airplane" (*id.* at A-47). The court held that petitioner's patent was invalid for obviousness, since it neither disclosed nor claimed the means of achieving controllability, *i.e.*, the means for ensuring that the resultant force of the vectored thrust passes through the center of gravity of the aircraft (*ibid.*):[1]

> The builders of the accused Pegasus, by expending some $70 million in the development of that engine, solved that problem, not Douglas. Having contributed nothing to the development of the critical relationship, Douglas cannot rely on the subsequent success of the accused airplanes to sustain the validity of his patent.

2. The Court of Claims' decision correctly applied settled principles to the particular patent at issue, and further review is not warranted.

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[1]Thus, the court found that petitioner's patent did not disclose or claim either of the two means employed to achieve controllability in the allegedly infringing British aircraft—the use of "four nozzles so arranged that the resultant force of the vectored jets acted at or near to the center of gravity of the airplane" and "a system of puffer jets to provide an auxiliary control" (Pet. App. A-47).

Petitioner argues that the court erred in finding his claimed invention obvious, because his patent application discloses that the resultant force of the deflected jet engine thrust should pass "through the center of gravity of the aircraft" (Pet. 10), which disclosure, petitioner claims, was implicit in one of the drawings in the patent application (see Figure 6, Pet. App. A-75). The Court of Claims improperly disregarded this disclosure, petitioner asserts, simply because the application did not go further and state that the "center-of-gravity" feature *must* be employed.

The Court of Claims specifically found, however, that petitioner's patent application did *not* "adequately disclose" the center-of-gravity feature that petitioner now claims (see *id.* at A-8 to A-9, A-44 to A-45).[2] That ruling was correct because the claims in petitioner's patent do not mention this feature (see *id.* at A-72), and "[t]he claims are the measure of the invention and resolution of the obviousness question must be based on what is claimed" (*id.* at A-45).[3] See, *e.g.*, *Kemode Mfg. Co.* v. *United States*, 347 F.2d 315, 319 (Ct. Cl.).

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[2]Petitioner errs in contending (Pet. 7, 10) that the Court of Claims "found" that his patent application disclosed the center-of-gravity feature. The lower court's finding upon which petitioner relies states only (Pet. App. A-50 to A-51):

> 9. The embodiments of Figs. 1 and 3 of the Douglas patent do not show the resultant force as passing through the center of gravity of the aircraft. The embodiment of Fig. 6 does illustrate an arrangement in which the resultant force acts near the center of gravity. Figs. 1 and 3 employ a double 90° bend for the gases; Fig. 6 has a single 90° bend.

This finding—that two of the three embodiments disclosed in petitioner's patent do not illustrate the center-of-gravity feature—is inconsistent with petitioner's claim that there was a clear and adequate disclosure of the feature. Moreover, the embodiment that petitioner elected during prosecution of the patent was not the one on which petitioner now relies as having disclosed the crucial center-of-gravity feature (*id.* at A-44, A-52).

[3]Petitioner's reliance (Pet. 6) on one of the government's requested findings, which attributed the center-of-gravity feature to Fig. 6, is misplaced, since the illustrations accompanying the claims are not controlling in this case.

Petitioner errs in suggesting a conflict between this decision and *United States* v. *Adams*, 383 U.S. 39, where the Court held that the patent claims in that case, taken together with the object of the invention set forth in the patent application, adequately disclosed the novel aspects of the invention. 383 U.S. at 48-49.[4] Here, neither the stated objects of petitioner's claimed invention (see Pet. App. A-71 to A-72) nor the patent claims themselves (*id.* at A-72) disclosed the means of achieving controllability of a jet aircraft by having a directionally-variable thrust pass through the center of gravity of the airplane.

The Court of Claims also ruled that, quite apart from the inadequacy of petitioner's claimed disclosure, "[t]he pictorial illustration of Fig. 6, from which it may be *inferred* that the thrust acts at or near to the center of gravity, is impractical" (*id.* at A-44). This finding of impracticality provides an independent ground for rejecting petitioner's claims. Cf. *Brenner* v. *Manson*, 383 U.S. 519, 534.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[4]The Court held in *Adams* that a wet battery invention was novel under 35 U.S.C. 102(a), since "the fact that the Adams battery is water-activated sets his device apart from the prior art." 383 U.S. at 48. The Court found that "a stated object of the invention was to provide a battery rendered serviceable by the mere addition of water" (*ibid.*) and that "[t]aken together with the stated object of disclosing a water-activated cell, the lack of reference to any electrolyte in Claims 1 and 10 indicates that water alone could be used." *Id.* at 49.